



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-92-8

FACTS:

You are the campaign treasurer for a Selectman in a Town who is also a public school teacher. The Selectman is also a candidate for the General Court.

QUESTIONS:

1. May the Selectman continue serving as a Selectman and as a public school teacher while running for a position in the General Court? and
2. Assuming that he wins the election to the General Court, may the Selectman serve as both a Selectman and a member of the General Court simultaneously?

ANSWERS:

1. Yes, subject to certain restrictions under G.L. c. 268A, §23; and
2. Yes, for the reasons stated below.

DISCUSSION:

1. As a Candidate

The Selectman's first question concerns the application of the conflict of interest law to his activities as a public official and as a candidate for the General Court. As a Selectman and a public school teacher, he is a municipal employee as that term is used in the conflict of interest law.^{1/} As such, the restrictions set forth in G.L. c. 268A apply to him. Although nothing in c. 268A would prohibit the Selectman from running for the office in the General Court while simultaneously serving as both a Selectman and as a public school teacher, he should be advised that §23(b)(2) of c. 268A prohibits a current officer or employee of a municipal agency from knowingly, or with reason to know:

us[ing] or attempt[ing] to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value^{2/} and which are not properly available to similarly situated individuals.

In *Commission Advisory No. 4 (Political Activity)*, the Commission advised that the use of public resources, available by virtue of one's public employment, for the purpose of conducting or supporting a political campaign, violates §23(b)(2). For example, a public employee may not use publicly-provided stationery, office supplies, utilities, telephones, office equipment (e.g., copying machines, typewriters, or word processors), office space or other facilities. These resources are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees. As *Advisory No. 4* makes clear, the taxpayers of the Commonwealth should not be forced to subsidize the political activities of those employed in government agencies.

Accordingly, while the Selectman may run for a seat in the General Court while employed as a public school teacher and a Selectman, he may not use public resources to assist his campaign.

The Selectman should also be advised that the above advice is limited to an application of the conflict of interest law, G.L. c. 268A, to his circumstances. Other laws, restrictions, or contractual provisions may also apply to him. For example, he must determine whether anything in his teachers' contract will require him to take a leave of absence while campaigning for office. In addition, issues may arise under G.L. c. 55, the campaign finance law. The Selectman should contact the Massachusetts Office of Campaign and Political Finance directly for further information on the application of c. 55 to him. *See, e.g., EC-COI-92-2.*

2. As a State Representative

The Selectman's second question concerns the application of the conflict of interest law to his activities as a member of the General Court and as a Selectman.^{3/} Assuming that he wins election to the General Court, the Selectman would become a state employee as that term is used in c. 268A.^{4/} *See, e.g., EC-COI-91-14; 89-35; 89-8.* As such, the restrictions set forth in c. 268A, §§ 4, 6 and 23 would apply to him.^{5/}

(a) Section 4

Section 4 of c. 268A prohibits a state employee from acting as an agent or attorney for, or receiving compensation directly or indirectly from, anyone other than the Commonwealth or a state agency in relation to a particular matter^{6/} in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

Without the application of some exemption, state employees would generally find that the restrictions of §4 would forbid their active participation at the municipal level. Prior to 1980, for example, §4 was applied to prohibit state employees from outside employment with municipalities where the Commonwealth had a direct and substantial interest in the matters on which the employees worked in their municipal capacity. *See EC-COI-83-26* (discussing St. 1980, c. 10, which became the municipal exemption, described below). For the reasons stated below, however, §4 will not prohibit a member of the General Court from simultaneously serving as an elected or appointed municipal official.

Members of the General Court who wish to serve as municipal officials may rely upon one of two exemptions found in §4: (i) the legislators' exemption (described below), *see, e.g., EC-COI-91-14; 89-31; 83-137; 82-137*, or (ii) the so-called "municipal exemption," applicable to all state employees. Reliance on either exemption would mean that any restrictions of the other exemption would not apply to the circumstances described. *See, e.g., EC-COI-87-36; 82-106.*

Specifically, the legislators' exemption provides that a member of the General Court is exempted from the restrictions of §4(a) and §4(c) except that no such member shall personally appear for any compensation^{7/} other than his legislative salary before any state agency, unless:

1. the particular matter before the state agency is ministerial in nature;^{8/} or
2. the appearance is before a court of the Commonwealth; or
3. the appearance is in a quasi-judicial proceeding.

This exemption makes the substantive restrictions of §4 inapplicable to members of the General Court in most instances. Accordingly, members of the General Court may rely upon the above exemption if they wish to simultaneously serve as municipal officials. As a consequence, we find that legislators need not be constrained by the limitations delineated in the other exemption to §4, the municipal exemption. The municipal exemption, applicable to all state employees, provides that §4:

[s]hall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the [state] agency by which he is employed or over which he has official responsibility.^{9/}

See, e.g., EC-COI-86-2 (employee of the Department of Environmental Quality Engineering (DEQE), who wished to serve as a member of the Board of Health in a town, may hold both positions provided that, as a Board

of Health member, he abstains on matters which DEQE regulates); *see also* 90-8; 84-103; 80-102. This exemption was designed to limit, but not entirely eliminate, the effects of the §4 restrictions regarding acts of agency and receipt of compensation.^{10/} The municipal exemption, in effect, is a somewhat more restrictive exemption than is the legislators' exemption. We find, however, that it is unnecessary to apply its limitations to state legislators because §4, by its own terms, does not apply to them in the first place, except in the very limited way described above. Consequently, members of the General Court may serve as elected or appointed municipal officials without being constrained by language of the municipal exemption because those members are entitled to rely upon a separate and distinct exemption which contains no such language. *Cf. EC-COI-82-39* (a legislative employee of the General Court who was also running for Selectman would be affected by the §4 municipal exemption).

In summary, should the Selectman be elected to the General Court, he may continue to serve as a Selectman and act on all matters before his Board, even if those matters come within the "purview" of the General Court. He may not, however, appear before state agencies, including the legislature, for compensation on behalf of his Town or other parties, except as provided in §4. Consequently, if the Selectman contemplates that he might be called upon to act on the Town's behalf before state agencies as a Selectman, he might find it advantageous to forego his Selectman's income, if any. By foregoing any such compensation, he can avoid issues arising under the legislators' exemption described above.

(b) Section 6

In addition to the above, a state employee, including a member of the General Court, is prohibited from participating^{11/} in a particular matter in which he, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a direct or a reasonably foreseeable financial interest.

Municipalities are "business organizations" within the meaning of this section. *See, e.g., EC-COI-92-3; 90-8; 90-4; 89-2; 85-67; 84-120; 82-25; 81-62; 81-56.* Consequently, if the Selectman should become a member of the General Court, he must abstain from participating in any particular matter which will directly or foreseeably affect his Town if he remains a Selectman. He should bear in mind that, while the enactment of general legislation and "petitions of cities, towns, counties, and districts for special laws related to their governmental organizations, powers, duties, finances and property" would not, by definition, be particular matters, the enactment of special legislation is a particular matter. *See EC-COI-89-8* (discussing the distinction between general and special legislation); 82-39 (prohibition applies to special legislation affecting legislative aide's town in which he serves as a Selectman). *See also EC-COI-90-8.*

(c) Section 23

Finally, the Selectman should be aware of how issues under §23(b)(2) may arise for him in connection with his service as a member of the General Court. For example, he must refrain from using his official position as a member of the General Court to secure unwarranted privileges or exemptions of substantial value for himself or his Town. *See EC-COI-90-8.* To comply with §23(b)(2), he must continue to conduct Town activities entirely outside of his legislative work and refrain from using any state resources in connection with his Town activities. *Id.; see also 91-6; 91-7.*

Date Authorized: March 12, 1992

^{10/}"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

^{12/}The Commission has determined that substantial value is \$50 or more. *Commission Advisory No. 8 (Free Passes)*. *See also, Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584 (1976).

^{13/}We assume, for purposes of this opinion, that the Selectman intends to resign as a public school teacher should he win election as a member of the General Court. If our assumption is incorrect, the Selectman should renew his opinion request to seek further guidance under c. 268A.

⁴“State employee,” a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractor or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. G.L. c. 268A, §1(q).

⁵While other restrictions under c. 268A would also apply to a member of the General Court — for example, §§ 2, 3, 5, and 7 — nothing in your opinion request raises an issue under any of those sections. Consequently, we need not review their application to his circumstances at this time. Should he seek additional guidance on any of those other restrictions, he should renew his opinion request.

⁶“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁷“Compensation,” any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

⁸The statute further describes those matters which are considered “ministerial.” *See* G.L. c. 268A, §4.

⁹“Official responsibility,” the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

¹⁰It is clear that the municipal exemption, as applied to members of the General Court, would be of little use given the legislature’s broad regulatory powers. As a member of the General Court who was also a Selectman in a town, the Selectman would find that many matters coming before the Board of Selectmen could be characterized as within the purview of the General Court. *See, e.g.,* Mass. Const. Pt. 1, C. 1, §1, Art. IV (which empowers the General Court to “make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions . . . as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same”).

¹¹“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).